Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

Petition for Declaratory Ruling that	)	
the Telecommunications Rate Applies to Cable	)	WC Docket No. 09-154
System Pole Attachments Used to Provide	)	
Interconnected Voice over Internet Protocol Service	)	

COMMENTS OF AMERICAN ELECTRIC POWER SERVICE CORPORATION, DUKE ENERGY CORPORATION, SOUTHERN COMPANY, AND XCEL ENERGY SERVICES INC.

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EXECUTIVE SUMMARY

- The Electric Utilities submit these Comments in support of their August 17, 2009 Petition for a declaratory ruling that the Telecom Rate, which applies to pole attachments used for traditional telephone service, also applies to cable system attachments used to provide interconnected VoIP service.

- It is well known that VoIP is increasingly a replacement for analog voice service, yet cable companies continue to claim that the Telecom Rate does not apply to attachments used to provide VoIP. The resulting billing disputes consume time and resources that could be better used to further the deployment of broadband.

- To fulfill its statutory obligation to regulate pole attachment rates and promote broadband, the Commission can and must act promptly to clarify this matter expeditiously—prior to consideration of the broader issues raised in the Broadband NOI and proposed rulemakings on IP-enabled services and pole attachments.

- Regardless of how VoIP is ultimately classified for other regulatory purposes, the Commission has a duty under the nondiscrimination provision of section 224(e) to apply the Telecom Rate to cable system pole attachments used to provide VoIP.

- Applying the lower Cable Rate to attachments used for VoIP would give an unfair competitive advantage to cable VoIP providers relative to competitive telephone service providers subject to the Telecom Rate. Applying the Telecom Rate to such cable attachments would increase regulatory parity and thereby promote broadband.

- Under section 224, the historic Cable Rate is not the "default" rate for attachments used by cable operators to provide commingled cable and other services, such as VoIP. On the contrary, in 1996 Congress intended to provide for a transition from the subsidized rate originally provided for the "infant" cable industry to the higher Telecom Rate for full-fledged cable participants in voice telephony markets.

- Electricity consumers, many of whom do not subscribe to VoIP services, must not be forced to subsidize Cable Giants like Comcast and Time Warner Cable. The cable industry's oft repeated claim that the Cable Rate is "compensatory" is irrelevant to both the legal issue of discrimination under section 224 and the policy issue of the inherent competitive advantage cable industry receives relative to its competitors.

- The Petition pertains only to cable attachments because CLEC attachments are already subject to the Telecom Rate, while ILEC attachments are not subject to the Commission's pole attachment jurisdiction. Also, there is no policy justification for Federal regulation of ILEC attachments.

- Charter Communications' cost impact estimates in its recent ex parte filing are exaggerated, misleading, and show only that Charter admits that it currently receives a subsidy relative to its competitors.

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COMMENTS OF THE ELECTRIC UTILITIES

American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc. (collectively "Electric Utilities")[1] hereby respectfully submit their Comments in response to the Commission's Public Notice in the above captioned proceeding establishing a pleading cycle for comments on the petition for declaratory ruling ("Petition") filed by the same Electric Utilities.[2] In that Petition, the Electric Utilities request the Commission to issue a declaratory ruling that the telecommunications rate formula ("Telecom Rate"),[3] which applies to jurisdictional pole attachments used for traditional telephone service,[4]

[1] The Electric Utilities are a group of four companies that serve electric consumers in 23 states and numerous metropolitan areas and own and maintain large numbers of poles with third-party attachments. The Petitioners serve both urban and rural areas in 18 of the 30 states in which pole attachments are regulated by the Commission.

[2] *Petition for Declaratory Ruling That the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service*, WC Docket No. 09-154, Public Notice (issued August 25, 2009).

[3] 47 C.F.R. § 1.1409(e)(2) (2008).

[4] The Petition focuses on attachments by cable systems. Attachments by competitive local exchange carriers ("CLECs") are already covered by the Telecom Rate. As explained in these Comments below, incumbent local exchange carriers ("ILECs") are excluded from the definition of "telecommunications carrier" in section 224 of the Communications Act (47 U.S.C. § 224(a)(5)) and, accordingly, ILEC attachments on electric poles are not subject to the Commission's pole attachment jurisdiction.

also applies to cable system pole attachments used to provide interconnected voice over internet protocol service ("interconnected VoIP" or "VoIP").[5]

It is widely recognized and accepted that VoIP is "increasingly used to replace analog voice service,"[6] yet cable companies continue to claim that the Telecom Rate does not apply to cable attachments used to provide VoIP. The resulting billing disputes between cable companies and pole owners consume time and resources that could be better used to deploy VoIP and other broadband technologies to help achieve important national priorities.[7] Moreover, and more significantly, the application of the Cable Rate to attachments used to provide VoIP gives cable companies an unfair competitive advantage over non-cable, competitive telecommunications carriers who provide similar voice and broadband services but who are statutorily subject to the higher Telecom Rate. This discriminatory treatment in favor of cable operators not only is contrary to the non-discrimination requirement of section 224(e) of the Communications Act,[8] but it also distorts the market by conferring a subsidy on cable operators and may thereby inhibit

[5] The Commission's regulations define "interconnected VoIP" as "a service that: (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user's location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network." 47 C.F.R. § 9.3. The petition addresses all attachments by cable companies that are used to provide VoIP services, including VoIP provided by the cable company itself (e.g., Comcast Digital Voice), by a cable affiliate, or by any third party using the attached cable wire (e.g., Vonage Digital Voice).

[6] *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, FCC 09-40 at para. 12 (2009) ("Discontinuance Order"), quoting *Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; Numbering Resource Optimization*, WC Docket Nos. 07-243, 07-244, 04-36, CC Docket Nos. 950116, 99-200, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 at para. 18 (2007), *pet. for review pending sub nom. National Telecomms. Cooperative Ass'n v. FCC* (D.C. Cir. No. 08-1071) ("VoIP LNP Order").

[7] For example, as President Obama has emphasized, broadband-based electric utility "smart grid" systems have the potential to "save us money, protect our power sources from blackout or attack, and deliver clean, alternative forms of energy to every corner of our nation." *See* U.S. News & World Report, *President-elect Barack Obama on His American Recovery and Reinvestment Plan - Remarks of President-elect Barack Obama as prepared for delivery* (January 8, 2009), *available at* < http://www.usnews.com/articles/news/stimulus/2009/01/08/president-elect-barack-obama-on-his-american-recovery-and-reinvestment-plan.html > (last accessed August 11, 2009).

[8] 47 U.S.C. § 224(e) (2006).

the deployment of competitive broadband infrastructure and services to the detriment of U.S. consumers.

The requested ruling is therefore urgently needed to remove any uncertainty regarding the applicability of the Telecom Rate to cable company attachments used to provide VoIP. To fulfill its statutory obligation to "regulate" pole attachment rates and promote broadband,[9] the Commission must act promptly to clarify this matter without waiting to resolve larger policy questions regarding the regulatory classification of VoIP.

The Electric Utilities support broadband deployment and seek to work constructively with the Commission in its efforts to implement the broadband provisions of the American Recovery and Reinvestment Act of 2009 ("Recovery Act").[10] Electric utility poles are a shared critical infrastructure whose primary purpose is to enable safe, reliable distribution of electric power. This critical electric infrastructure also happens to be an expedient physical platform for communications and broadband deployment. By eliminating regulatory uncertainty regarding the applicable rate for cable attachments used to provide VoIP, the requested ruling will help ensure that poles and pole attachments continue to serve as an opportune platform for broadband deployment.[11]

In its *IP-Enabled Services* proceeding, the Commission continues to consider whether VoIP is a "telecommunications service," an "information service," or neither.[12] Regardless of

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[9] 47 U.S.C. § 224(b) (2006) ("the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable"). *See also* 47 U.S.C. § 157 (2006) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public").

[10] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

[11] *See A National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of Utilities Telecom Council and Edison Electric Institute at 14-15 (filed June 8, 2009) (explaining that, far from being impediments, pole attachments facilitate broadband deployment).

[12] Discontinuance Order at fn. 21.

how VoIP is ultimately classified for other regulatory purposes, the Commission has a statutory mandate under the nondiscrimination provision of section 224(e)—as well as ample authority under section 224 otherwise—to apply the Telecom Rate to cable system pole attachments used to provide interconnected VoIP. Neither good policy nor a sound reading of the statute would support applying the historic Cable Rate to cable VoIP attachments, which would give an unfair competitive advantage to cable company VoIP providers relative to competitive telephone service providers subject to the Telecom Rate. By contrast, clarifying that the Telecom Rate applies to cable VoIP attachments will "ensure regulatory parity among providers of similar services [and thereby] minimize marketplace distortions . . . ."[13] The requested clarification is a measure the Commission can take—and should take—expeditiously prior to consideration of the broader issues raised in the Broadband NOI and proposed rulemakings on IP-enabled services and pole attachments.[14]

I. Facts and Policy Discussion

The Electric Utilities agree with the Commission that the "once-clear distinction between 'cable television systems' and 'telecommunications carriers' has blurred as each type of company enters markets for the delivery of services historically associated with each other."[15] In particular, the Commission has repeatedly found that interconnected VoIP is "functionally indistinguishable" from traditional telephony and has, accordingly, subjected VoIP to an array of regulations applicable to traditional telecommunications services. Cable company advertising and other public statements reflect such convergence, boasting that VoIP is the same as ordinary

[13] VoIP LNP Order at para. 17.

[14] *See Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM Docket Nos. 11293, 11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007) ("Pole Attachment NPRM").

[15] Pole Attachment NPRM at para. 14.

telephone service and the cable companies regularly referring to themselves as competitors in the "telecommunications" industry. Cable companies also hold themselves out as telecommunications carriers to state regulators in order to provide local telephone service and to obtain regulatory benefits such as interconnection rights.

Yet, the same cable "telecommunications" competitors continue to represent to electric utility pole owners that VoIP is not really a telecommunications service subject to the Telecom Rate. The result is confusion and ongoing disputes between cable operators and electric utility pole owners. If permitted to pay the cable rate for VoIP attachments, cable companies will enjoy an unjust competitive advantage relative to other telecommunications service providers—surely not a desired outcome on the part of the Commission. Furthermore, this disparity in rates between competing providers of functionally equivalent services results in a continued subsidy borne on the backs of one of the country's largest consumer segments—the electric ratepayer.

A. VoIP is a substitute for traditional telephone service and, accordingly, is subject to many of the same regulations which apply to CLECs.

The Commission has repeatedly found that interconnected VoIP is a "replacement" or "substitute" for traditional voice telephony provided by competitive local exchange carriers ("CLECs") and other telecommunications carriers.[16] Internet Protocol networks are, to a degree, "technically and administratively" different from the public switched telephone network ("PSTN"), the main difference being that IP-enabled services use broadband Internet connections

[16] *See* Discontinuance Order at para. 8, ("interconnected VoIP service increasingly is used as a replacement for traditional voice service"); *accord*, VoIP LNP Order at paras. 18, 28 ("VoIP service is 'increasingly used to replace analog voice service,' including, in some cases, local exchange service" and "interconnected VoIP services are increasingly being used as a substitute for traditional telephone service"); *see Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, MD Docket No. 07-81, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712, at para. 12 (2007) ("Regulatory Fees Order") ("Interconnected VoIP service is increasingly used to replace traditional phone service and … the interconnected VoIP service industry continues to grow and to attract customers who previously relied on traditional voice service…").

instead of ordinary phone lines.[17] But VoIP is "*functionally* indistinguishable" from traditional telephone service.[18] VoIP enables the customer, using a broadband connection, to terminate calls to the PSTN and receive calls originating on the PSTN.[19] From the perspective of the telecommunications services consumer, as well as those with whom the consumer communicates, VoIP technology is "virtually indistinguishable" from traditional telephone service offered by competing telephone companies.[20] As evidence of the substitutability of IP-enabled services generally, "the American public has embraced them, resulting in the widespread adoption of mass market interconnected [VoIP] and broadband services by millions of consumers for voice, video, and Internet communications."[21]

As the Commission noted in its Regulatory Fees Order, the "explosive growth" of the VoIP industry and the extent to which VoIP is used as a replacement for traditional telephone service have "necessitated" numerous Commission rulings that VoIP is subject to the same

[17] *See IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4917, para. 4 (2004) ("VoIP NPRM").

[18] Discontinuance Order at para. 12 (emphasis added).

[19] VoIP LNP Order at para. 12.

[20] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 at para. 56 (2007) ("CPNI Order"), *aff'd, National Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009) ("these services, from the perspective of a customer making an ordinary telephone call, are virtually indistinguishable" from the telephone services of a wireline carrier); *see also* Regulatory Fees Order at para. 18 ("interconnected VoIP providers offer a service that is almost indistinguishable from the consumers' point of view, from the service offered by interstate telecommunications service providers"); *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36,05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, at para. 24 (2005) ("VoIP 911 Order"), *aff'd, Nuvio Corp. v. FCC,* 473 F.3d 302 (D.C. Cir. 2006); (using the term "VoIP" to refer to "services that mimic traditional telephony").

[21] Discontinuance Order at para. 1.

regulations that apply to telephone service provided by telecommunications carriers.[22] These regulations include an array of requirements under Title II of the Communications Act:

- 911 emergency calling capability requirements (section 251(e));[23]
- universal service contribution obligations (section 254(d));[24]
- customer proprietary network information ("CPNI") requirements (section 222);[25]
- disability access obligations (section 255);[26]
- Telecommunications Relay Service ("TRS") (section 225(b)(1));[27] and
- local number portability ("LNP") and numbering administration support obligations (sections 251(e) and 251(b)(2)).[28]

The Commission has also determined that interconnected VoIP is subject to the Communications Assistance for Law Enforcement Act ("CALEA") and has required VoIP providers to pay regulatory fees at the same rate as telecommunications services providers, based on FCC Form

[22] Regulatory Fees Order at para. 18; *see also* VoIP LNP Order at para. 19 ("these characteristics of interconnected VoIP service support a finding that it is appropriate to extend LNP obligations to include such services …").

[23] 47 U.S.C. § 251(e). *See* VoIP 911 Order at para. 1.

[24] 47 U.S.C. § 254(d). *See Universal Service Contribution Methodology*, WC Docket No. 06-122; CC Docket Nos. 96-45, 98-171, 90-571, 92-237; NSD File No. L-00-72; CC Docket Nos. 99-200, 95-116, 98-170; WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538-43, paras. 38-49 (2006) ("Universal Service Order"), *aff'd in part, vacated in part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007).

[25] 47 U.S.C. § 222. *See* CPNI Order.

[26] 47 U.S.C. § 255. *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123 & CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275, 11291-97 (June 15, 2007) ("TRS and Disability Access VoIP Order").

[27] 47 U.S.C. § 225(b)(1). See TRS and Disability Access VoIP Order.

[28] *Id.* at §§ 251(e) and 251(b)(2). *See* VOIP LNP Order.

499-A revenue data.[29] Thus, in numerous contexts, the Commission has already deemed VoIP to be the same as telecommunications service for regulatory purposes.

B. Cable companies boast that their VoIP services are comparable to voice telecommunications service offered by competitors.

In countless public advertisements and other publicly available documents, cable companies have made no secret that their VoIP services are competing with telephone companies in markets for telecommunications services. In fact, they openly boast that they offer voice telecommunications services, or an equal (or better) substitute. Significantly, the former National Cable Television Association, in 2001, changed its name to the National Cable *and Telecommunications* Association ("NCTA"),[30] confirming that its members offer telecommunications services, not just cable television service. Moreover, the press release announcing the name change stated that the "new name better reflects the industry's changing landscape," since broadband has allowed the cable industry to provide "entertainment, information *and telecommunications services*."[31] More recently, NCTA's "talking points" entitled *The Cable Bundle is a Great Value for Consumers*, posted on NCTA's public website, boasts of its status as a full-fledged competitor: "Cable offers real phone competition…. Cable has risen to be a true competitor to the Bell giants in the residential voice market."[32] NCTA's website also reports that, as of December 2008, 19.6 million customers had switched to VoIP or

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[29] *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, at para. 1 (2005) ("CALEA VoIP Order"), *aff'd sub nom. American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006); *see also* Regulatory Fees Order at paras. 11-13.

[30] NCTA, *NCTA Changes its Name to National Cable & Telecommunications Association* (April 30, 2001), *available at* http://www.ncta.com/ReleaseType/MediaRelease/131.aspx (last accessed August 11, 2009) (emphasis added) (included as Attachment I).

[31] *Id*. (emphasis added).

[32] NCTA, *Talking Points: The Cable Bundle is a Great Value for Consumers* (March 10, 2009), *available at* <http://www.ncta.com/PublicationType/TalkingPoint/CablePricing.aspx> (last accessed August 12, 2009).

other telephony services provided by cable companies.[33] Comcast's Digital Voice service alone has made Comcast "the third largest residential phone service provider in the U.S., serving nearly 6.5 million customers."[34]

Nationwide, "most" cable companies are providing VoIP phone service.[35] Through frequent (if not daily) mailings, the major cable companies boast of their voice telephony offerings via "triple play" and similar "bundles." Prospective subscribers are assured that cable VoIP is equal to or better than regular telephone service:

- Comcast touts "our reliable home phone service."[36]
- Comcast of Georgia explains: "You are probably wondering about the digital voice telephone service. Comcast has used digital technology and applied it to the traditional telephone, giving subscribers better service including extra features and better sound quality."[37]
- Time Warner Cable notes that its Digital Phone service "works with your existing phones and jacks. There's nothing to buy."[38]
- Cox bluntly states that "Cox phone [service] *is* the same primary line telephone service you've known for years inside your home."[39]

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[33] NCTA, *Industry Data available at* <http://www.ncta.com/Statistics.aspx (last accessed June 22, 2009).

[34] *See* Comcast, *2008 Annual Review - Digital Voice available at* <http://www.comcast.com/2008annualreview/delivering/digitalvoice.html> (last accessed June 23, 2009).

[35] NCTA, *Digital Phone/Cable Telephony Issue Brief*, *available at* <http://www.ncta.com/IssueBriefs/Digital-Phone-Cable-Telephony.aspx> (last accessed June 23, 2009).

[36] *See* Comcast, *2008 Annual Review - Digital Voice available at* <http://www.comcast.com/Corporate/Learn/DigitalVoice/digitalvoice.html> (last accessed June 23, 2009).

[37] *See* Comcast Georgia, *Comcast Georgia Offers Digital Cable, High Speed Internet & Phone available at* <http://comcast.usdirect.com/georgia-comcast.html> (last accessed June 23, 2009).

[38] *See* Time Warner Cable, *Digital Phone available at* <http://www.timewarnercable.com/CentralNY/learn/phone/default.html> (last accessed June 23, 2009).

[39] *See* Cox, *Find Out More - More You Can Do with Cox Phone available at* <http://ww2.cox.com/residential/northernvirginia/phone/answers-about-phone.cox > (last accessed June 23, 2009) (emphasis added).

If the VoIP telephone services these Cable Giants are providing are indeed "the same" as any other telephone service, cable VoIP providers should be subject to the same rate for pole attachments as their telecommunications carrier counterparts.

C. Cable companies hold themselves out to state regulators as telephone service providers.

Further support for treating cable companies providing VoIP as telecommunications carriers is found in the fact that many of these cable companies hold themselves out to state regulators as providers of local exchange and interexchange telephone services. These cable companies operate pursuant to certificates of public convenience and necessity issued by state regulators for the provision of CLEC and interexchange carrier ("IXC") services and file tariffs with state regulators for the provision of these services to the public.[40] If these companies were actually using their facilities "solely to provide cable service," they would have no need to obtain state CLEC or IXC certification, nor would they have any need to file and maintain tariffs with state regulators for the provision of local exchange and interexchange telecommunications services.

There are two primary reasons for cable companies to voluntarily undergo the state certification and tariffing process. First, many state regulators have recognized that the interconnected VoIP services provided by cable companies are functionally equivalent to—and real-world substitutes for—traditional telephone service, and therefore, they should be subject to

[40] For example, Comcast's subsidiary Comcast Phone of Georgia, LLC holds IXC Certificate X-1035 and CLEC Certificate L-002 issued by the Georgia Public Service Commission ("Georgia PSC"). *See IXC Certificate X-1035 for Comcast Phone of Georgia, LLC d/b/a Comcast Digital Phone*, Georgia Public Service Commission Docket No. 14027-U (revised March 24, 2008) and *CLEC Certificate L-002 for Comcast Phone of Georgia, LLC d/b/a Comcast Digital Phone*, Georgia Public Service Commission Docket No. 5943-U (revised June 23, 2005). Comcast Phone of Georgia, LLC also has tariffs on file with the Georgia PSC for the provision of Local Exchange Services, Interexchange Services, and Access Service. *See* Comcast Phone of Georgia LLC Local Exchange Services Tariff No. 3 (effective Feb. 14, 2003), Comcast Phone of Georgia LLC Interexchange Service Tariff No. 2 (effective Feb. 14, 2003), and Comcast Phone of Georgia LLC Access Service Tariff No. 1 (effective April 16,

the same rights and obligations as any other competitive telephone service provider. Second, by obtaining a state certification as a telecommunications carrier, a cable company obtains significant advantages such as statutory interconnection rights.[41]

Yet while cable companies are eager to hold themselves out as competitive telecommunications carriers when there is a regulatory advantage to be gained—such as interconnection—they are just as eager to insist that they are not providing telecommunications service when asked to pay the same pole attachment rates that apply to their competitors. In this way, cable companies are able to engage in unfair regulatory arbitrage to the detriment of competition and consumers.

D. Applying the Cable Rate to VoIP attachments gives cable companies an unfair competitive advantage over other telephone service providers.

The legislative history of the Pole Attachments Act (as amended by the Telecommunications Act of 1996) shows that the Cable Rate was "established to spur the growth of the cable industry, *which in 1978 was in its infancy*."[42] It is abundantly clear today that the cable industry is no longer an infant industry, and its spectacularly successful VoIP services have no need of further regulatory "incubation" in the form of a competition-distorting pole attachment rate advantage. As former Commissioner Abernathy cautioned, "the interest in developing nascent platforms cannot justify regulatory disparities indefinitely."[43] Explaining the "nascent services doctrine," she specifically warned that "applying different regulations to

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2009), *available at* <http://www.comcast.com/corporate/about/phonetermsofservice/circuit-switched/statetariffs/georgia.html> (last accessed August 11, 2009).

[41] *See, e.g., Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513 at para. 8 (2007).

[42] H. Rpt. 104-204, Committee on Commerce Report to Accompany H.R. 1555, the Communications Act of 1995 (July 24, 1995) (emphasis added).

providers in a single market inevitably causes marketplace distortions and leads to inefficient investment."[44]

To the extent a cable operator provides telephony services that are functionally equivalent to traditional telephone service, such cable operator should be subject to the same pole attachment rate as other telephony providers whose attachments are under the Commission's pole attachment jurisdiction. The requested ruling will eliminate the glaring regulatory disparity between attachment rates for providers of competitive telephone services. By eliminating this regulatory disparity, the Commission will also eliminate opportunities for regulatory arbitrage and establish a level playing field that will benefit competition and consumers.

E. Applying the Cable Rate to VoIP places an additional cost burden on consumers.

The disparity between the pole attachment rates paid by competitive telecommunication carriers and by cable companies providing functionally equivalent telephone services also places a significant cost burden on one of the largest groups of U.S. consumers—*electric ratepayers*. In general, pole attachments are not separate "profit centers" for electric utilities. Rather, the revenues generated by pole attachments serve to offset the pole infrastructure costs incurred by the utility. Every dollar that a cable company avoids paying for its use of the space on the utility's pole is one dollar more that must be rolled into the costs that make up the utility's regulated rate to consumers. Conversely, if the Commission were to establish regulatory parity between telecommunications carriers and cable companies providing functionally equivalent VoIP, every dollar received from the cable company is one less dollar that must be incorporated

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[43] Remarks of FCC Commissioner Kathleen Q. Abernathy Before the Federal Communications Bar Association New York Chapter, New York, NY, July 11, 2002 at 3.

[44] *Id*.

into a utility's retail rates. Accordingly, clarification by the Commission that the Telecom Rate applies to cable attachments used for VoIP telephony will reduce the cost burden borne by electric ratepayers, many of whom cannot even afford the cable company services that they currently subsidize.

F. Cable companies cause disputes by claiming to electric utility pole owners that VoIP is not a telecommunications service subject to the Telecom Rate.

It is virtually impossible for an electric utility to determine which pole attachment rate applies to cable attachments on its poles if the attaching cable operator does not identify the nature of the service it offers using those attachments. Under the Commission's regulations, cable operators are required to notify the pole owner "upon offering telecommunications services."[45] However, in many cases, the only "notice" the pole owner receives is in the form of advertisements announcing that the cable company now offers a "triple play" bundle of video, internet, and voice services in one subscription.

Although these cable companies boast that their voice services are "the same" as voice telecommunications services provided by telephone companies, the same cable companies routinely insist to utility pole owners that their attachments are not being used to provide telecommunications services. For example, in a letter to Georgia Power Company, the Cable Television Association of Georgia ("CTAG") explains at length that "VoIP is Not Telecommunications"[46] and, therefore, cable companies should not be required to pay the higher Telecommunications Rate for the pole attachments used to provide VoIP services. Such statements are at odds with cable industry representations to consumers and to state regulators

[45] 47 C.F.R. § 1.1403(e).

[46] Letter from Cable Television Association of Georgia to Georgia Power, December 12, 2008 (included as Attachment II) (capitalized in the original) ("CTAG Letter").

and make a mockery of the Commission's requirement that cable companies notify pole owners upon providing telecommunications services.[47]

Cable companies' insistence on paying only the Cable Rate for VoIP attachments has also given rise to disputes with CLECs who object to the unfair and discriminatory competitive advantage their cable telephony competitors receive as a result of this disparate treatment. In a request for mediation of a pole attachment dispute filed by EasyTEL, a CLEC that attaches to poles owned by Public Service Company of Oklahoma ("PSO"), EasyTEL complained that "[b]y charging EasyTEL the 'telecommunications rate' and failing to charge the same rate to similar providers, such as Cox, PSO violates the requirement to apply its rates on a non-discriminatory basis."[48] In this case, Cox claimed to provide only video and broadband Internet access services, including VoIP, to its residential customers. The requested declaratory ruling would eliminate what EasyTEL describes as the "discriminatory pole attachment rate regime that benefits the larger, entrenched cable operator . . . ."[49]

G. Clarifying that the Telecom Rate applies to VoIP would help eliminate such disputes and facilitate broadband penetration through greater regulatory parity in voice telephony markets.

The Electric Utilities agree with the Commission that "[t]imely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas."[50] To ensure such access, the Commission should clarify its pole attachment rules to reduce the opportunity for cable companies to instigate and perpetuate disputes by ensuring that

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[47] 47 C.F.R. § 1.1403(e) (stating that "[c]able operators must notify pole owners upon offering telecommunications services").

[48] Letter from EasyTel to Marlene H. Dortch, Secretary Federal Communications Commission at 2-3, August 1, 2008 (included as Attachment III).

[49] *Id.* at 2.

pole attachment rates for similar services are the same. Different pole attachment rates for similar services inherently gives rise to disputes which use time and resources that could, instead, be devoted to broadband deployment. Clarifying that the Telecom Rate applies to all equivalent telephony services, including VoIP, will eliminate the principal cause of such disputes.

The best way to promote broadband is to promote competition. Regulatory parity and economically efficient price signals are needed for true competition. In its Broadband NOI, the Commission was correct to seek comment on the role of "marketplace competition" in broadband deployment.[51] Furthermore, in several VoIP orders, the Commission cited the need to foster competition by creating a level playing field for providers of equivalent services. In determining that VoIP is subject to LNP requirements, the Commission stated: "[w]e believe that these steps we take to ensure regulatory parity among providers of similar services will minimize marketplace distortions arising from regulatory advantage."[52] If interconnected VoIP providers were exempt from LNP, they "would sustain a competitive advantage against telecommunications carriers . . . thus defeating the critical requirement under section 251(e) that carriers bear such costs on a competitively neutral basis."[53] Analogously, if cable systems that provide VoIP are exempt from the Telecom Rate, they will continue to sustain a competitive advantage against their CLEC counterparts, thus defeating a critical purpose of section 224 to provide for rate uniformity among competitive voice telecommunications providers whose attachments are subject to the Commission's pole attachment jurisdiction.

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[50] Michael J. Copps, Acting Chairman Federal Communications Commission, *Bringing Broadband to Rural America - Report on a Rural Broadband Strategy* at para. 157 (May 22, 2009) *available at* <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A1.pdf>.

[51] Broadband NOI at paras. 25, 49 (seeking "comment on the extent to which competition between various broadband … providers should be evaluated as an effective and efficient mechanism to achieve the goals of the Recovery Act").

[52] VoIP LNP Order at para. 1.

In support of its decision to apply universal service contribution obligations on VoIP providers, the Commission cited the principle of "competitive neutrality," meaning that universal service rules should "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[54] To avoid creating opportunities for "regulatory arbitrage" by a market participant that seeks to use VoIP in order to avoid universal service obligations, the Commission chose to apply the same rules to equivalent services.[55] This approach "reduces the possibility that carriers with universal service obligations will compete directly with providers without such obligations."[56] Consistent with these VoIP decisions, the Commission should eliminate the unfair competitive advantage cable VoIP providers currently enjoy with respect to pole attachments. In so doing, the Commission would also eliminate the current disparity in attachment rates between CLECs and cable companies providing functionally equivalent telephone services, thus fulfilling the intent of section 224(e) that pole attachment rates for such services be nondiscriminatory.[57]

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[53] *Id.* at para. 27.

[54] Universal Service Order paras. 38-49.

[55] *Id.* at para. 44.

[56] *Id.*

[57] 47 U.S.C. § 224(e).

II. Legal Authority

Regardless of whether VoIP is ultimately classified as a telecommunications service, the Pole Attachments Act, Commission regulations, and Federal Court precedents all support applying the Telecom Rate to attachments used to provide commingled cable and VoIP services. The Cable Rate is not the default rate for commingled cable and IP-enabled telephony services and should not be presumed to apply to cable attachments used to provide VoIP. Even if VoIP were generically classified as an information service, which it has not been, the Cable Rate would not apply by default.

The Commission has a duty and ample authority under section 224 to clarify the just and reasonable rate applicable to attachments used for telephone services, such as VoIP, that are not "solely" cable service. Application of the Telecom Rate to cable VoIP attachments is necessary to satisfy the nondiscrimination requirement of section 224(e). In addition, it is reasonable to include VoIP within the meaning of the term "telecommunications service" for purposes of section 224. In any event, the text of section 224 and Federal court decisions make clear that the Telecom Rate is a just and reasonable rate and that the Commission has ample discretion to apply the Telecom Rate to VoIP attachments. Also, applying the Telecom Rate to similar telephone services is consistent with the Commission's mandate under section 706 to spur broadband deployment by promoting telecommunications competition.

It should further be noted that cable industry claims that the courts have found the cable rate to be sufficiently "compensatory" are misleading and irrelevant to the questions of whether the cable rate is a subsidy rate and whether the cable rate is discriminatory.

Finally, ILEC attachments on electric poles are not, and should not be, subject to the Commission's pole attachment regulations.

A. Applying the Cable Rate to VoIP attachments would be unlawfully discriminatory.

Section 224(e) directs the Commission to implement the Telecom Rate by establishing regulations that "shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for *pole attachments*."[58] Applying the Cable Rate to cable system attachments used for services functionally identical to telephone services provided by CLECs clearly discriminates between two categories of "pole attachments": (1) CLEC attachments used to provide traditional telephone service; and (2) cable attachments used to provide VoIP telephone service. The same rate must be applied to both CLEC attachments and cable system attachments used for VoIP, and this rate *must* be the Telecom Rate. Pursuant to section 224(e), the Commission cannot apply any rate to CLECs other than the Telecom Rate, regardless of what services the carrier may be providing. This subsection provides no exemption for telecommunications carriers that also provide video or internet services. Thus, the only way for the Commission to satisfy the nondiscrimination obligation of section 224(e) is to apply the Telecom Rate to all CLEC telephony and cable VoIP providers on a competitively neutral basis.

B. The text, structure, and legislative history of the Pole Attachments Act show that VoIP is a "telecommunications service" for purposes of section 224 and, accordingly, that the Telecom Rate applies to pole attachments used to provide VoIP.

The nondiscrimination requirement of section 224 applies regardless of whether VoIP is classified as a "telecommunications service" for any purpose. Nevertheless, the text, structure, and legislative history of section 224 show that Congress intended the term "telecommunications services"—at least for purposes of section 224—to include all voice telephony services that compete with traditional telephone services provided by telecommunications carriers.

[58] 47 U.S.C. § 224(e)(1) (emphasis added).

Accordingly, VoIP plainly falls within the scope of "telecommunications services" as the term is used in section 224, and the Telecom Rate therefore applies to attachments used to provide such VoIP service.

A core purpose of the Telecommunications Act of 1996 was to facilitate entry into telephony markets by non-incumbent entities, including cable systems.[59] As the D.C. Circuit recently noted in *Verizon California v. FCC*, the Commission has read the Telecommunications Act of 1996 "as having the promotion of facilities-based local competition as its fundamental policy . . . ."[60] Consistent with that purpose, with respect to pole attachment rates, the chief point of the Pole Attachments Act amendments of 1996 was twofold: (1) to provide a regulated pole attachment rate for non-incumbent telephone companies (i.e., CLECs); and (2) to provide for a transition up to the Telecom Rate for cable systems that have become full-fledged competitors with CLECs in markets for providing telephone service.

Congress anticipated cable systems would offer a broad array of telecommunications services, including voice telephone services, in competition with traditional telephony or other services offered by CLECs.[61] Moreover, it is clear Congress intended the Telecom Rate to apply to cable companies that offer telephone service. Section 224(d)(3) provides that the Cable Rate

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[59] *See, e.g.*, S. Rep. No. 104-230, Senate Report on 652 at 5 (1996) ("The legislation reforms the regulatory process to allow competition for local telephone service by cable, wireless, long distance, and satellite companies, and electric utilities, as well as other entities") (emphasis added).

[60] *Verizon California v. FCC*, 555 F.3d 270 at 274 (D.C. Cir. 2009) (citing *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 at 557 (D.C. Cir. 2004) ("*Verizon Cal. v. FCC*").

[61] In the context of the 1996 Act's overarching purpose to facilitate competition for telephone service, the use of the term "telecommunications service" in section 224 was broadly intended to include cable companies that compete with local exchange carriers. At the time, "telecommunications service" was generally understood to include telephony and Congress already regarded the evolving cable companies as providers of telecommunications services. Referring to the original Cable Rate, a House Report states: "The formula, developed in 1978, gives cable companies a more favorable rate for attachment than other telecommunications service providers." House Report on H.R. 1555, H.R. Rep. No. 104-204 at 91 (1995). Because CLECs are the "other" telecommunications service providers, it is clear that Congress regarded cable company competitors as "telecommunications services providers" for pole attachment rate purposes.

shall apply to any pole attachment used by a cable television system "solely to provide cable service" and, *until the effective date of the regulations providing for the new Telecom Rate*, also to any cable system pole attachment used "to provide any telecommunications service."[62] It follows that, when Congress said the Cable Rate would apply to "any" telecommunications service only until the Telecom Rate is established, Congress plainly meant that the Telecom Rate would thereafter apply to *any* telecommunications service of whatever kind,[63] regardless of its technological underpinnings, and particularly to any voice telephony services (such as VoIP service today).

The Commission has properly construed the term "telecommunications service" broadly where the context requires a broad reading. As the court in *Verizon California* explained in construing the term "any telecommunications services" for purposes of consumer privacy rules under section 222, "different contexts [may] dictat[e] different interpretations" of a defined statutory term.[64] The FCC has concluded in several contexts that services that are functionally similar "from the perspective of the end-user" should be subject to the same regulatory classification.[65] As the court noted in *NCTA v. Brand X*, whether a service includes a telecommunications offering turns on "the nature of the functions the *end user* is offered,' … for

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[62] 47 U.S.C. § 224(d)(3) (emphasis added).

[63] *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)) ("The term 'any' has 'an expansive meaning, that is, 'one or some indiscriminately of whatever kind'").

[64] *Verizon Cal. v. FCC* at 276. Analogously, in the *Number Portability Order*, the Commission considered whether the phrase "all telecommunications carriers" in section 251(e)(2) (regarding the obligation to contribute to the costs of numbering administration) could be read broadly enough to include interconnected VoIP. VoIP LNP Order at para. 28 (emphasis added). Observing that "interconnected VoIP services are increasingly being used as a substitute for traditional telephone service," the Commission concluded that the term "all" in this context "reflects Congress's intent to ensure that no telecommunications carriers were omitted from the [numbering administration] contribution obligation, and does not preclude the Commission from exercising its ancillary authority to require other providers of comparable services to make such contributions. Thus, the language does not circumscribe the class of carriers that may be required to support numbering administration . . . ." VoIP LNP Order at para. 28. In this case the Commission has no need to use ancillary authority because section 224 already provides ample discretion.

[65] *Time Warner Telecomm., Inc. v. FCC*, 507 F.3d 205 at 217 (3rd Cir. 2007).

the statutory definition of 'telecommunications service' does not 'res[t] on the particular types of facilities used' . . . ."[66] As noted above, the Commission has repeatedly affirmed that VoIP is, from the standpoint of the end user, functionally identical to ordinary telephone service.

C. The Cable Rate is not the default rate for commingled cable and VoIP services.

Cable companies argue that, because VoIP has not yet been classified as a telecommunications service, the Cable Rate is the only rate that can apply to attachments used for commingled cable and VoIP. For example, in a letter to Georgia Power Company, CTAG asserts, "[o]nly pole attachments that are specifically used to provide telecommunications service are eligible for the higher telecom attachment rate."[67] CTAG's conclusion, however, does not follow.

Section 224 sets forth a separate rate for each of two categories of attachments: the Cable Rate for attachments used "solely" to provide cable service[68] and the higher Telecom Rate for attachments used by telecommunications carriers to provide telecommunications service. Thus, when a cable system uses a pole attachment to provide services other than cable service, section 224(d) does not compel application of the Cable Rate. If the cable system provides telecommunications services in addition to cable service, its attachments are then statutorily subject to the Telecom Rate. If the cable system does not provide telecommunications service but provides some other type of service in addition to cable television service, the cable formula is then no longer binding on the Commission. Instead, in this alternative situation, the Commission is required only to ensure that the resulting rate is just, reasonable, and

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[66] *NCTA v. Brand X Internet Serv.*, 545 U.S. 967 at 988 (2005) (citations omitted).

[67] CTAG Letter at 3.

[68] Section 224(d)(3) provides that the Cable Rate "shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service." (Emphasis added). 47 U.S.C. § 224(d)(3).

nondiscriminatory.[69] As discussed below, because the Telecom Rate has already been established and upheld as just and reasonable, it is well within the Commission's authority to apply this rate to any attachment used to provide a service other than, or in addition to, cable television service.

D. The Commission has a duty under section 224 to identify the just and reasonable rate applicable to attachments used to provide VoIP.

The Pole Attachments Act provides that the Commission "shall regulate the rates, terms and conditions for pole attachments."[70] The statute, in turn, defines "pole attachment" in relevant part as "any attachment by a cable television system" to a utility pole, duct, conduit or right-of-way.[71] An attachment by a cable system used to provide VoIP service is, therefore, a pole attachment subject to Commission regulation. However, because the Commission has not yet definitively classified VoIP as either an information service or a telecommunications service, and because the Cable Rate is not the default rate in the absence of such determination, the result is a significant gap in the Commission's regulation of pole attachments. The Commission is statutorily obligated to fill expeditiously that gap by clarifying which pole attachment rate applies to VoIP attachments.

Establishing that the Commission has jurisdiction over all cable attachments is only the first step in discharging its statutory obligation. As the Supreme Court observed in *NCTA v. Gulf*, after determining that it had jurisdiction over commingled cable and internet services, the Commission "then had to set a just and reasonable rate."[72] Although the Commission has

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[69] 47 U.S.C. § 224(b)(1).

[70] 47 U.S.C. § 224(b).

[71] 47 U.S.C. § 224(a)(4), *see also NCTA v. Gulf Power* at 333 ("[a]s we have noted, the Act requires the FCC to 'regulate the rates, terms, and conditions for pole attachments,' § 224(b), and defines these to include 'any attachment by a cable television system,' § 224(a)(4)").

[72] *NCTA v. Gulf Power* at 337.

asserted that the cable rate formula applies to commingled cable and certain internet services,[73] the Commission has yet to make a determination regarding the appropriate rate formula for commingled services that include interconnected VoIP. The Commission is therefore obliged to clarify the applicable pole attachment rate for VoIP.

E. The Telecom Rate is just and reasonable for cable VoIP attachments.

Cable companies defend the competitive advantage they enjoy by stating that the Cable Rate has been upheld as the "fully compensatory" and "just and reasonable" rate.[74] As further discussed in part H below, their argument is both misleading and wholly irrelevant to the core issues of rate subsidization and discrimination addressed in the Petition. In these cases, the courts have simply deferred to the Commission to determine the just and reasonable rate for commingled cable services. The courts have repeatedly affirmed, not limited, the Commission's discretion to apply a different rate if it chooses to do so.[75] Indeed, on every occasion the courts have specifically acknowledged that the Telecom Rate is just and reasonable.[76] Even the economist cited in Comcast's own initial comments on the pole attachment NPRM has admitted on cross examination in a pole attachment rate case that the "telecom formula reflects economically appropriate cost allocation principles" and that the "telecommunications formula is

[73] It should be noted that the Court in *NCTA v. Gulf Power* did not review the Commission's choice of the cable rate for commingled cable and internet service. The Court addressed "only whether pole attachments that carry commingled services are subject to FCC regulation at all," not "the rate the FCC has chosen, a question not now before us." *Id.* at 338.

[74] *See*, *e.g.*, A *National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of the National Cable and Telecommunications Association at 35 (filed June 8, 2009).

[75] *See, e.g.*, *NCTA v. Gulf Power* at 338; *Texas Util. Elec. Co. v FCC*, 997 F.2d 925 (D.C. Cir 1993).

[76] See *Alabama Power v. FCC*, 311 F.3d at 1371 n23 (11th Cir. 2002), *citing In the Matter of Ala. Cable Telecomm. Ass'n*, 16 FCC Rcd. 12,209, ¶ 49 ("The FCC reached a perfectly logical conclusion when it observed: "'Congress' decision to choose a slightly different methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula . . . because both formulas provide just compensation under the Fifth Amendment . . . . Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates."); *Georgia Power v. Teleport Comm. Atlanta*, 346 F.3d 1033 at 1047 (11th Cir. 2003) (holding that the Telecom Rate provides just compensation).

consistent with cost causation principles."[77] Today, the congruence of VoIP and traditional telephony warrants that the Commission should choose regulatory parity over the perpetuation of an entrenched subsidy for a specific subset of competitive service providers.

F. Electricity consumers, many of whom do not subscribe to VoIP services, must not be forced to subsidize Cable Giants like Comcast and Time Warner Cable.

Perpetuating a competitive advantage for cable VoIP relative to other competitive telephone providers unjustifiably distorts the market and inhibits competition. However, funding this competitive advantage at the expense of electric consumers—particularly those who neither have nor want VoIP service—is outrageous and anything but just and reasonable from the point of view of the consumer. The Cable Rate is inherently a subsidy rate formula because it does not divide the cost of the common (i.e., so-called "unusable") space on the pole equally among all attachers.[78] As a result, electric utility customers are compelled to pay more than their fair share of the costs of pole infrastructure.

Congress mandated in section 224(c)(2)(B) of the Act that any State seeking to preempt the Commission's regulation of the rates, terms, and conditions for pole attachments must certify that it has authority to consider and does consider "the interests of the consumers of the utility services."[79] By establishing the consideration of utility consumer interests as a precondition for

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[77] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM Docket Nos. 11293, 11303, Reply Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida at 21 fn 68 (filed April 22, 2008), citing *Florida Cable Telecommunications v. Gulf Power*, EB Docket No. 04-381, Hearing Transcript, Volume 8 at 1399:4-7, 1404:12-16 (Federal Communications Commission, April 26, 2006).

[78] The Commission's regulations define "unusable space" as "the space on a utility pole below the usable space, including the amount required to set the depth of the pole." 47 C.F.R. § 1.1402(l). The cable attacher pays only a small portion of the entire cost of the pole, based only on the percentage of usable space it occupies. This approach disregards that the cable attacher, like any other user of the pole, needs the common space to maintain a sufficient ground clearance as is required by applicable safety codes such as the NESC. The Telecom Rate, although also a subsidy rate, at least allocates a portion of the common space among all attaching entities.

[79] 47 U.S.C. § 224(c)(2)(B).

State preemption of Federal pole attachment regulation, Congress made clear that it likewise expects the Commission to take the interests of utility customers into consideration in regulating pole attachment rates.

Electric utility service is not a convenience but, rather, a critical component of modern life. For the vast majority of Americans, electric service is a necessity, not an option. If cable VoIP providers are allowed to pay only the Cable Rate, a low-income or fixed-income customer who does not want VoIP service would effectively be forced to subsidize the cable company's provision of high-end "triple play" video, internet, and VoIP telephone services to users who need no subsidy. Also, because the pole infrastructure costs are spread across an electric utility's entire customer base, electric customers residing in areas where no cable company provides service are bearing an even more unfair burden, because they have no ability to purchase any cable company's offering. In any event, it is inequitable to expect electric ratepayers to subsidize participants in another industry. The Commission has a statutory obligation to prevent this unjust, unreasonable, and unconscionable result.

G. Applying the Telecom Rate to VoIP is consistent with the section 706 mandate to promote broadband competition.

Section 706 directs the Commission to encourage the deployment of advanced telecommunications capability in a manner consistent with "measures that promote competition in the local telecommunications market . . . ."[80] As the Commission explained in its recent VoIP Discontinuance Order: "We also are guided by section 706 of the 1996 Act, which, among other things, directs the Commission to encourage the deployment of advanced telecommunications capability to all Americans by using measures that 'promote competition in the local

[80] 47 U.S.C. § 157 nt.

telecommunications market.'"[81] Applying the Telecom Rate to all telephone providers under the Commission's pole attachment jurisdiction, including cable VoIP providers, will promote competition by ensuring "regulatory parity among providers of similar services [and] will minimize marketplace distortions arising from regulatory advantage."[82]

H. Cable industry claims that the Cable Rate is "fully compensatory" do not justify continued discrimination and rate subsidies reaped by Cable Giants at the expense of electric consumers and telephone company competitors.

When imposed over thirty years ago, the Cable Rate was specifically intended to "spur the growth of the cable industry, which in 1978 was in its infancy." This policy objective of supporting an infant industry may have made sense at that time; yet, today, the cable industry is a mature one, fully grown up and capable of "standing on its own two feet." As Congress fully anticipated in crafting the 1996 Act amendments to the Pole Attachments Act, Cable Giants such as Comcast and Cox have become full-fledged competitors in markets for all varieties of telecommunications services, particularly broadband telephony. Clearly, these Cable Giants no longer need a subsidy in the form of a special pole attachment rate that is far lower than the rate paid by their non-cable competitors. In this regard, the Cable Rate is a historic relic that should be consigned to the regulatory attic.

It is absurd for the Cable Giants to imply that their industry remains an infant one or that they do not fully compete in markets for telecommunications services. Despite the absurdity of this position today, each time the continued relevance of the historic Cable Rate subsidy is questioned, the Cable Giants claim that the courts have "on every occasion" found the current

[81] Discontinuance Order at para. 13, quoting 47 U.S.C. § 157 nt.; *accord*, VoIP LNP Order at para. 29.

[82] VoIP LNP Order at para. 17.

cable pole rate to be more than fully compensatory to utility pole owners" and "not a subsidy."[83] This claim is grossly misleading and irrelevant to the issues raised in the Petition. First, none of the court cases cited hold that the Cable Rate is "not a subsidy." Second, none even discuss the issue of subsidization. Finally, none of the cases relied upon by the Cable Giants to feebly buttress their arguments even address the issue of whether the Cable Rate for commingled services violates the nondiscrimination mandate of section 224(e). Comcast and other cable commenters conveniently ignore the fact that the "more favorable" of two statutory rates inherently provides a subsidy to cable attachers (at the expense of electric consumers) and, thereby, confers a discriminatory and unlawful competitive advantage relative to telecommunications carriers that pay the Telecom Rate.

The Federal court cases relied upon by Comcast and NCTA do not hold that the Cable Rate is "more than fully compensatory" or "not a subsidy." First, Comcast claims that the Supreme Court in *FCC v. Florida Power* "found" that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the cost of capital, is confiscatory."[84] This case is inapplicable to the subsidy issues raised in the Petition for several reasons. First, Comcast disingenuously fails to disclose the context of the Court's statement: "*Appellees [i.e., Florida Power et al] have not contended*, nor could it seriously be argued …."[85] In other words, the issues of the whether the rate in question in fact provided for recovery of "fully allocated cost" or whether the rate was confiscatory were simply not before the Court.

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[83] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM Docket Nos. 11293, 11303, Comments of Comcast Corporation at i, 1 and 16 (filed March 7, 2008) ("Comcast NPRM Comments"); see also A *National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of the National Cable and Telecommunications Association at 35 (filed June 8, 2009).

[84] *FCC v. Florida Power Corp.*, 480 U.S. 245, 255 (1987).

[85] *Id.*

Moreover, the Court nowhere mentions the term "subsidy." In this case, the Court overturned the Eleventh Circuit's judgment that the Pole Attachments Act was unconstitutional because it allowed the Commission, rather than the courts, to determine whether the Cable Rate provided just compensation for a taking. The Eleventh Circuit had decided that, under *Loretto*, the Pole Attachments Act resulted in a *per se* taking, requiring just compensation as determined by the courts. In its decision, the Court rejected this reasoning, explaining that nothing in the Pole Attachments Act (in 1987 when *Florida Power* was decided) "gives cable companies any right to occupy space on utility poles . . . ."[86] In citing to this case over twenty years later, Comcast neglects to point out that the Pole Attachments Act was amended by the 1996 Act to do precisely that: to provide a right of cable systems to attach to utility poles.

The Eleventh Circuit revisited the constitutional question raised in *Florida Power* much later in the case of *Alabama Power*,[87] the only other Federal court case Comcast cites in support of its argument. Here again, the Court does not address either the issue of subsidies or the issue of rate discrimination. In *Alabama Power*, the Court found that—in the case of nonrivalrous poles only—the cable rate can provide "just compensation" for purposes of the narrow constitutional takings issue.[88] Whether a rate, under certain factual circumstances, can provide just compensation for purposes of the Fifth Amendment, is not the same question as whether the rate provides a subsidy and, thereby, a discriminatory competitive advantage to one category of participants in a competitive market.[89] In the case of the Cable Rate, the 1978 policy goal of incubating a nascent video industry has long since been achieved. Aside from whether in 2009

[86] *Id.* at 251.

[87] *Alabama Power Company v. FCC*, 311 F.3d 1357 (11th Cir. 2002)

[88] *Id.* at 1370-1371.

[89] On the contrary, the courts have made clear that rate subsidies intended to achieve policy goals are not inherently unconstitutional. See, *e.g.*, Pennell *v. City of San Jose*, 485 U.S. 1 (1988).

the Court would conclude that the Cable Rate is constitutionally deficient, the *Alabama Power* case in no way substantiates the cable industry's position regarding either subsidies or rate discrimination resulting from application of the Cable Rate.[90]

Common sense and logic show that, of the two statutory rates provided in the Pole Attachments Act, the lower Cable Rate is a subsidy rate.[91] Because it does not divide the cost of the common space equally among all attachers, the Cable Rate is inherently a subsidy formula that does not achieve a full allocation of the costs properly allocable to cable attachers. Instead, a cable attacher pays only a disproportionately small fraction of the entire cost of the pole, based only on the percentage of usable space it occupies. This approach disregards the fact that the cable attacher, like all other users of the pole, needs the common space to have any ground clearance and certainly to maintain sufficient ground clearance as is required by applicable safety codes such as the NESC. Without the common space, there is, in effect, no "pole."

Logically, the existence in the statute of two different formulas, distinguished merely on the basis of the type of communications service provided over the attached wire, shows that the Cable Rate provides a subsidy to cable attachers versus other attachers subject to the Telecom Rate. As discussed above, the legislative history of the 1996 Act amendments to section 224 shows that Congress definitely understood that the Cable Rate was intended to be a "more favorable rate" established to "spur the growth of the cable industry, which in 1978 was in its

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[90] Moreover, the precise contours of *how* to apply the holding in *Alabama Power* are at issue in a proceeding currently pending before the Commission. *See Florida Cable Telecommunications Assoc. v. Gulf Power Co.*, EB Docket No. 04-381 ("*FCTA v. Gulf Power*"). After a hearing which focused on the application of the new standard announced in *Alabama Power*, the Chief Administrative Law Judge entered an Initial Decision in FCTA's favor in January 2007. Gulf Power (an operating company subsidiary of Southern Company) filed its exceptions to the Initial Decision (a necessary pre-requisite to taking an appeal to the circuit court) in March 2007. By sua sponte order dated August 1, 2007, the Commission indefinitely extended its deadline for resolution of the matter. The Commission has taken no direct action in the matter since that time.

[91] Whether or not the Telecom Rate is also a subsidy rate is not an issue raised by the Petition. By not raising this issue in the Petition, the Electric Utilities in no way relinquish their right to do so at a future date or in other proceedings or forums.

infancy." Hence, Congress foresaw the need to establish the Telecom Rate and the transition of cable companies to that rate once they engaged in the provision of telecommunications services. Otherwise, there would have been no reason for Congress to distinguish between the Cable Rate and Telecom Rate formulas in the 1996 Act.

Thus, the Cable Rate is plainly a subsidy rate that confers a competitive advantage to cable companies over CLECs in the VoIP telecommunications services market. By applying the "more favorable" Cable Rate to any Commission-jurisdictional pole attachment *other than an attachment used to provide "solely" cable service as specifically authorized by the statute*, the Commission is perpetuating favoritism in violation of the nondiscrimination mandate of section 224(e).

I. The Commission has neither statutory authority nor policy justification to regulate ILEC attachments.

The Petition correctly addresses only those attachments subject to the Commission's pole attachment jurisdiction. As stated in the Petition, ILEC attachments on electric poles are not subject to the Commission's pole attachment jurisdiction.[92] The comments filed by the Edison Electric Institute and numerous other parties (including cable companies) last year in the Pole Attachment NPRM docket explain in detail how the plain text, legislative history, and over a decade of Commission and Federal Court precedent all show that Congress had no intent to extend the provisions of the Pole Attachments Act to ILEC attachments. As the Commission, and even the ILECs themselves, have repeatedly acknowledged, ILECs are excluded from the definition of "telecommunications carrier" in section 224 and, accordingly, ILECs have no attachment rights under the statute.[93] Nothing has changed statutorily since 1996. Thus, the

[92] *See* 47 C.F.R. § 1.1402(h) (excluding ILECs from the definition of telecommunications carrier).

Commission should ignore attempts by any parties to this proceeding and, indeed, to any other proceeding where pole attachments have been raised, to create a right where, statutorily, none exists.

Moreover, there is no sound policy justification for making ILEC attachments eligible for regulated rates under the Pole Attachments Act. As was the case in 1996 when Congress expressly excluded ILECs from the expanded rate protections of section 224, ILECs continue to own significant numbers of poles. ILEC attachment fees are subject to existing joint use and joint ownership agreements, and these agreements are pervasively regulated by the States under State joint use acts. Any attempt by the Commission to abrogate these existing contracts, whether in whole or with respect to pole attachment compensation terms specifically, would result in massive regulatory confusion and State-Federal disputes in every State in which the Commission currently regulates pole attachments.

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[93] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order at para. 5, FCC 98-20 13 FCC Rcd 6777 (1998) ("1998 Report and Order"), *aff'd in part, rev'd in part, Gulf Power v. FCC,* 208 F.3d 1263 (11th Cir. 2000), *rev'd & remanded*, *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002); *see, e.g.* 1998 Report and Order at para. 19 (stating that "[t]he 1996 Act…specifically excluded incumbent local exchange carriers … from the definition of telecommunications carriers with rights as pole attachers."); *see*, *i.e.*, *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of Bell Atlantic at 5-6 (filed September 26, 1997) (stating that "the Act defines a 'pole attachment' as 'any attachment by a cable television system or provider of telecommunications service,' but specifically exempts incumbent local exchange carriers from the definition of a telecommunications carrier."); *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of SBC Communications Inc., at 21 (filed September 26, 1997) (arguing that ILECs should not be attaching entities indicating that the NPRM in the proceeding noted "that the definition of 'telecommunications carrier' … excludes ILECs and that 'pole attachment' therefore does not include an ILEC attachment and stating that "the plain language of § 224 precludes ILEC's from being treated as attaching entities."); *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of Ameritech at 11 (filed September 26, 1997) (stating that "[t]he plain language of Section 224(e)(1), coupled with the definition of 'attachment' in Section 224(a)(4) and the exclusion of the ILEC from the definition of 'telecommunications carrier' for purposes of Section 224 requires that ILECs should not be counted as attaching parties.").

Accordingly, consistent with the statute and sound policy, the nondiscrimination mandate of section 224(e) simply does not extend to ILEC attachments. The Commission cannot legally conclude otherwise.

III. Charter's exaggerated cost impact figures are misleading and prove nothing except that Charter does in fact receive a competitive advantage relative to its competitors

A. Charter's estimates of customer rate increases are grossly inflated, misleading, and have nothing to do with either the law or good policy.

Charter Communications, Inc. ("Charter") boasts that it is "one of the largest broadband providers and *is already the tenth largest telephone service provider in the country*."[94] Yet Charter argues that it should not pay the same pole attachment rate as other telephone service providers. In a September 16, 2009 ex parte filing, Charter claims that the requested ruling would result in cost increases of between "$4.95-$8.66 per Internet subscriber per month and $13.27-$23.23 per voice subscriber per month . . . ."[95] The ex parte filing gives no explanation for these extremely specific, yet wide-ranging, figures, but an examination of similar claims Charter made in comments filed last year in the Pole Attachment NPRM docket[96] shows that these figures are grossly exaggerated because they are calculated on the basis of skewed assumptions that have nothing to do with the requirements of section 224. Significantly, none of these claims have anything to do with the legal question at issue in this proceeding: whether the Cable Rate for VoIP violates the nondiscrimination mandate of section 224(e). Nor do these claims address the policy issue of whether the Cable Giants should continue to receive a

[94] *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Charter Communications, Inc. Notice of Ex Parte Presentation at Reforming the Universal Service Fund to Ensure Universal Broadband Availability (filed Sept. 16, 2009).

[95] *Id.* at 1.

[96] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM Docket Nos. 11293, 11303, Comments of Charter Communications, Inc. (filed March 7, 2008).

competitive advantage in the form of a subsidy rate for Cable VoIP relative to Cable's CLEC competitors.

In particular, three "red flags" in Charter arguments show that its cost increase estimates are inflated, misleading, and have nothing to do with either the law or good policy. The first red flag is that Charter's estimates are, by Charter's own admission, not representative of the cable industry attachments regulated by the Commission. Charter's "Exhibit A" example is a cable system comprised of its Connecticut affiliates ("Northeastern" and "Western"), whose attachments *are not even regulated by the Commission*. In Connecticut, the Connecticut Department of Public Utility Control ("DPUC") regulates pole attachment rates—not the Federal Communications Commission.[97] Charter does not explain Connecticut's rate methodology, how such methodology is similar to or different from the Commission's methodology, nor why rates in a non-FCC-regulated State are an appropriately representative example. Even if Connecticut were under the Commission's jurisdiction, which it is not, it should be noted that Connecticut is one of the highest-income, highest-cost-of-living areas in the country. Charter uses an exemplar Cable Rate of $7.50 per pole, which—according to the cable industry's own figures—is higher than the typical Cable Rate. Comcast, for example, repeatedly uses the figure of $5.96 as a "typical" Cable Rate amount in its comments on the pole attachment NPRM.[98] NCTA's comments in the same proceeding allege "weighted averages" of $3.76 and $5.14 for telephone and electric utilities, respectively, in FCC-regulated States.[99] According to NCTA, the cable rate

[97] Federal Communications Commission, *Corrected List of States that Have Certified that they Regulate Pole Attachments*, WC Docket No. 07-245 (March 21, 2008) *available at* <http://www.fcc.gov/eb/Public_Notices/DA-08-653A1.html> (last accessed September 23, 2009).

[98] Comcast NPRM Comments at Exhibit 1, Report of Patricia D. Kravtin at 67-68 (in the context of a case study "which I believe to be typical").

[99] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM Docket Nos. 11293, 11303, Comments of the National Cable and Telecommunications Association at 9 fn. 30 (filed March 7, 2008), citing TWTC Presentation Regarding Pole

for electric poles in nine out of 32 FCC-regulated States is between $1.00 (New Mexico) and $4.00 (Arkansas).[100] Furthermore, Charter's assumption of 35 poles per mile is hardly representative of rural areas, or even of system-wide averages nationwide. For example, Xcel Energy reports a figure of approximately 23 poles per mile in rural areas. It should also be noted that 35 poles per mile translates to 151 foot spans between poles. In the experience of the Electric Utilities, significantly longer spans—and, therefore, significantly lower numbers of poles per mile—are typical, especially in rural areas. For example, Duke Energy's distribution standards provide for span lengths of between 200 feet and 350 feet (depending on the size the wires used and other factors) for all areas.

The second red flag in Charter's calculations is the fact that Charter's "average" increase figures are not a system-wide average at all. Rather, Charter separately calculates a rate increase for basic cable, internet, and digital voice subscribers and arbitrarily assigns a much higher share of the alleged aggregate cost increase to its internet and digital voice subscribers. By emphasizing such artificially inflated increases for its internet and digital voice customers, Charter creates the appearance of a much greater average cost increase than is actually the case across its customer base. Neither the text of section 224 nor the Commission's pole attachment regulations say anything at all about how a cable system should allocate its costs to its customers. If Charter chooses to allocate a larger proportion of a particular cost item to a

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Attachment NPRM attached to Letter from Thomas Jones, Counsel to Time Warner Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Oct. 23, 2007) (comparing cable rates between $4.57 and $7.10 with telecom rates between $10.41 and $18.21); see also *Id.* at Attachment 2, Table A-3 (filed March 7, 2008). In the case of electric utilities, the "weighted average" is higher than the "simple average" ($5.06).

[100] *Id.* at Attachment 2 Table A-3. Only two States mentioned in NCTA's analysis had rates equal to or higher than Charter's $7.50 amount—Hawaii and New Hampshire. *Id.* However, as of last year, New Hampshire pole attachments are no longer FCC-regulated. The FCC currently regulates pole attachments in 30 States. *See* Federal Communications Commission, *Corrected List of States that Have Certified that they Regulate Pole Attachments*, WC Docket No. 07-245 (March 21, 2008) *available at* <http://www.fcc.gov/eb/Public_Notices/DA-08-653A1.html> (last accessed September 23, 2009).

particular customer class, or to its shareholders, that allocation has nothing to do with the requirements of the Pole Attachments Act. A pole attachment rate is a rate that applies to "any attachment" by a cable system.[101] Where such attachments are used to provide services—such as VoIP—other than providing "solely" cable service, the nondiscrimination requirement of section 224(e) demands that those attachment be subject to the same rate that applies to any CLEC: i.e., the Telecom Rate.

Although Charter does not explain why it would allocate a pole attachment cost increase differently among different customer groups, Charter seems to be suggesting that the pole attachment rate somehow corresponds to the use of an individual pole or attachment to directly serve an individual subscriber. However, whether a particular attachment is used to provide VoIP has nothing to do with whether a particular cable customer in a vicinity of a particular pole is a VoIP subscriber, an internet subscriber, or a basic cable subscriber. All Charter attachments that are used to carry a VoIP signal for the purposes of serving Charter's digital voice customers—wherever they may be along Charter's system—would be subject to the Telecom Rate. Any associated cost increase for Charter could just the same be allocated across its entire customer base—not frontloaded onto its VoIP customers. As the Commission has made clear in the context of "dark fiber," the determination that a cable system's attachment is "used" for a particular service turns on whether the signal passes through the attachment, not whether the signal is used for a specific customer of the cable system.[102]

[101] 47 U.S.C. § 224(a)(4).

[102] In fact, the consumer of the service need not be a customer of the cable company at all. *See In the Matter of Marcus Cable Associates, LP v. Texas Utilities Electric Company*, FCC 03-173, Order on Review at paras. 15-16 (Adopted July 15, 2003) (rejecting TU Electric's claim that the Telecom Rate applies only to "attachments for services offered by the attacher itself … and not to attachments that are used to allow third parties to provide services").

Charter uses figures for its Connecticut companies to illustrate its claims. Charter assumes that its current average pole rent (presumably calculated using the Cable Rate formula) of $7.50 per pole will, under the Telecom Rate, increase to $17.10 (assuming three attaching entities) per pole—a cost increase of $9.60 per pole. Charter claims it has 4,321 plant miles, with 35 poles per mile, the product of which (unstated by Charter) is a total of 151,235 poles. Thus, the total cost increase for all poles would equal $1,451,856. Charter also states in its summary table of "Source Data" that it has 101,969 "Basic Subscribers."[103] Thus, to determine the total average *annual* cost increase per subscriber, we must divide the total aggregate cost increase by the total number of subscribers: $1,451,856 / 101,969 = $14.24 per Charter subscriber *per year*, which translates, in turn, into a monthly impact of $1.19 per month—a far cry from the $4.95 to $23.23 figures Charter continues to emphasize.[104] In other words, even if we accept Charter's underlying (and unrepresentative) source data, their statistical wizardry overstates the average impact by a factor of between 5 and 19 times the true average. The skewing effect of Charter's rejiggering of its own number has nothing to do with the law. Charter's fanciful patchwork of supposed customer rate increases simply does not result from the transition from the historic Cable Rate to the non-discriminatory Telecom Rate.

A third red flag is that Charter abuses the rural-urban distinction to maximize the rhetorical impact of its claims. Charter claims that, within the Connecticut DPUC system, there are only 11.8 "basic subscribers" per mile, as compared to a system-wide average of 23.6 subscribers per mile. First, Charter is apparently not quite clear on what counts as rural for

[103] It is not clear whether this total of "Basic Subscribers" includes internet and digital voice subscribers. The Electric Utilities assume—in Charter's favor—that this figure includes all Charter subscribers within the Connecticut DPUC system.

[104] Another way to reach the same result is to use Charter's stated system-wide average of customers per mile (23.6), average of poles per mile (35), and cost increase figure of $9.60 per pole annually, calculating a monthly average as follows: ((35 x $9.60) / 23.6) / 12 months = $1.19 per customer per month.

purposes of its calculations, because it uses the entire Connecticut DPUC system as its first example of a "rural" system, stating that most Charter systems "have to deal with the low population density characteristic of rural America. In Connecticut, for example, Charter has only 23 subscribers per average plant mile."[105] Second, Charter claims that it is "more expensive to deliver services (especially broadband and other advanced services) to less densely populated rural areas because there are fewer subscribers overall and fewer subscribers per plant mile from which to recover costs."[106] The record shows that the vast majority of such costs especially for "broadband and other advanced services" is head-end capital equipment and other high-tech gear that has nothing to do with pole attachment rates.[107] Also, if Charter is concerned about a differential impact in rural areas, it should provide its own subsidy at the expense of its urban customers, rather than relying on a government mandated subsidy at the expense of electricity consumers and to the competitive disadvantage of other telephone providers.

B. Charter Communication's cost increase estimates, if taken seriously, constitute an admission by Charter that it in fact receives a competitive advantage relative to its CLEC competitors.

The many red flags in Charter's previously filed comments show that its cost increase figures are, at best, misleading. However, *if Charter's claims about pole attachment rates are to be taken seriously at all*, there is only one reasonable way to read the company's filing: Charter's statement constitutes a public admission that Charter currently enjoys an enormous competitive advantage relative to its CLEC competitors in the amounts stated. Specifically, if

[105] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM Docket Nos. 11293, 11303, Comments of Charter Communications, Inc. at 3 (filed March 7, 2008).

[106] *Id.*

[107] *See A National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of the Coalition of Concerned Utilities at Exhibit D, Declaration of Dennis R. Krumblis para. 9 (filed June 8, 2009) (stating that "head-end electronics for broadband cost at a minimum approximately $35,000").

Charter's numbers are taken at face value, the current subsidy equals somewhere between $4.95 to $23.23 per customer per month. On Charter's public internet site, the company claims: "With more than 1.4 million telephone customers, Charter is the 10th largest provider of landline telephone service in the nation."[108] Thus (apart from the also pertinent question of whether or not "landline telephone service" should be considered anything other than "telecommunications services"), it is clear from Charter's statements that, with respect to Charter's telephone customers alone, it currently enjoys a subsidy of up to ($23.23 x 1,400,000 =) $35,522,000. This means that Charter has a $35+ million *per month* "head start" relative to its CLEC competitors. Putting aside Charter's conclusory and dubious arithmetic, we absolutely agree with what Charter seems to be freely admitting: that Charter's competitors would benefit greatly from the level playing field that would result if the Commission were to discharge its legal obligation under the Pole Attachments Act to provide for nondiscriminatory rates.

In any event, Charter's claims regarding alleged cost increases—however distorted—are wholly irrelevant to the central legal issue before the Commission: the need to clarify that the nondiscrimination mandate of section 224(e) requires cable systems to pay the same rate as their CLEC competitors (i.e., the Telecom Rate). As explained above, the courts have on every occasion found that the Telecom Rate is just and reasonable. The only remaining legal issue is discrimination. The Pole Attachments Act makes clear that—with the sole exception of a cable system whose attachments are used "solely" to provide cable service—all Commission-jurisdictional pole attachment rates must be at the same level mandated for "providers of telecommunications service" as defined in section 224.

[108] Charter, *About Charter available at* <http://www.charter.com/Visitors/AboutCharter.aspx?NonProductItem=20> (last accessed September 22, 2009).

Although the legal issue of discrimination is paramount in this proceeding, it should be emphasized that Charter's claims are likewise irrelevant to the important policy issue involved in this proceeding: cable systems whose attachments are used to provide VoIP should not receive a competitive advantage relative to their competitors who provide traditional telephone service.

IV. Conclusion

The Electric Utilities could not agree more with Commissioner Copps's statement that "[w]e all marvel at the tremendous and transformative potential of IP services …. But to unleash the full potential of this new technology and to ensure that these services succeed, we need rules of the road—clear, predictable and confidence building."[109] By clarifying the "rules of the road" regarding pole attachment rates for VoIP, the ruling requested in the Petition will bring greater competitive parity to broadband telephony markets, in turn, supporting further investment, reducing disputes and conserving resources. All of these results will help tap the full potential of broadband VoIP.

The cable industry's claims that the cable rate "overcompensates" utilities or that payment of the statutorily required Telecom Rate will increase the cost of cable broadband services are misleading, exaggerated, and *have no bearing on the legal issue before the Commission in this proceeding*: the requirement of section 224(e) that (except as otherwise expressly provided in the statute for attachments used "solely" to provide cable service) all Commission-jurisdictional pole attachment rates be nondiscriminatory. These cable industry claims are likewise irrelevant to a significant policy issue related to this proceeding: cable

[109] *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, Statement of Michael K. Powel at 34 (2004), *aff'd*, *Minnesota PUC v. FCC*, 483 F.3d 570 (2007).

systems should not receive a competitive advantage relative to other providers of telephone service.

Respectfully submitted,

/s/ Sean B. Cunningham
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Counsel to American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc.

Dated: September 24, 2009

Attachment I

ABOUT NCTA

Leadership Team

Departments

Visiting NCTA

Cable Multimedia Center

Membership

The Vanguard Awards

Affiliated Links

History of Cable

NCTA Job Postings

NCTA Store

FAQ

Contact Us

NCTA CHANGES ITS NAME TO NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION; Revamped Web Site Launched

Publication Type: Media Release
Date: 4/30/2001

Marc O. Smith/Lori Stout-Chang, 202/775-3629

WASHINGTON, DC – NCTA's name-change -- from the National Cable Television Association to the National Cable & Telecommunications Association – will become effective Tuesday, May 1, 2001. The change, first announced in February, reflects cable's transformation from a one-way video provider to a competitive supplier of advanced, two-way services, including digital video, high-speed Internet, cable telephony and interactive TV.

"Our new name better reflects the industry's changing landscape," said NCTA President & CEO Robert Sachs. "Cable is no longer simply a provider of one-way video programming. Cable is using its broadband infrastructure to provide consumers with a competitive choice of entertainment, information and telecommunications services."

Since passage of the 1996 Telecommunications Act -- intended to promote competition and investment in the telecommunications market -- the cable industry has raised and invested more than $45 billion for facilities upgrades that make delivery of advanced, two-way services possible. The industry currently serves more than 10 million digital cable, four million cable modem and one million cable phone customers.

NCTA also will re-launch its web site (www.ncta.com) May 1. The revamped online resource will provide the latest industry information in a user-friendly format for the industry's customers, the media, NCTA members, and other interested parties.

The National Cable & Telecommunications Association (NCTA), formerly the National Cable Television Association, is the principal trade association of the cable television industry in the United States. NCTA represents cable operators serving more than 90 percent of the nation's cable television households and more than 150 cable program networks, as well as equipment suppliers and providers of other services to the cable industry. In addition to offering traditional video services, NCTA's members also provide broadband services such as high-speed Internet access and telecommunications services such as local exchange telephone service to customers across the United States.

Visit us at www.ncta.com for the latest information about the cable industry, including recent press releases, industry statistics, NCTA regulatory and court filings, cable's commitment to customer service, quality programming, education and technology initiatives, and much more.

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Attachment II

Davis Wright Tremaine LLP

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December 12, 2008

Via First Class Mail and Email

Joseph R. Lawhon
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Atlanta, GA 30308-2216

Re: Georgia Power Pole Attachment Rental Rates and Survey

Dear Joe:

I am writing on behalf of the Cable Television Association of Georgia ("CTAG") and its members, for clarification of the recent Georgia Power Company ("Georgia Power") pole attachment rate notices and attachment count survey sent to CTAG members, and to request further information concerning the same. For your reference, we have enclosed a sample rate notice and attachment count survey sent by J. Darryll Wilson on November 1, 2008 and by Lan Zhang on November 14, 2008, respectively.

First, on behalf of my clients we want to express our appreciation that Georgia Power requested telecommunications attachment usage data in advance of billing this year. I believe this effort to establish a just and reasonable bill prior to invoicing is a step forward from Georgia Power's past billing procedures. We do, however, have certain remaining concerns with both the increase notice and attachment count survey which we have outlined for you in this letter.

Pole Count

The attached rate notices from Mr. Wilson provide for a cable rate of $5.72. In order for CTAG to verify whether these rates have been calculated in accordance with Federal Communications Commission ("FCC") regulations, please provide the total number of poles solely owned by Georgia Power, the total number of poles jointly owned by Georgia Power and the percentages of joint ownership (*i.e.*, the pole equivalent number Georgia Power used to

calculate its rates).[1] In addition, please confirm that the pole count includes all Georgia Power poles used for distribution of any kind, regardless of their make or character, and that the count also includes all drop poles.

If we do not receive a current pole count from Georgia Power enabling us to verify the cable rate of $5.72, we will advise CTAG members to continue to pay Georgia Power at the 2007-2008 rate of $5.62. After the parties mutually agree upon the appropriate rate, we can arrange any necessary "true-up" payment. Of course, if Georgia Power's pole count data otherwise supports the $5.72 rate, we will so advise our clients.

Telecom Rates

The attached rate notices from Mr. Wilson provide for telecommunications rates of $14.83 and $13.70 for rural and urban areas, respectively. While CTAG members do not dispute Georgia Power's right to implement a telecommunications rate in accordance with 47 U.S.C. § 224(e), Georgia Power has failed to provide sufficient information in support of its 2009 rates to demonstrate the average numbers of attaching entities justifies a departure from the FCC's presumptions. Accordingly, it is unclear to us that your telecommunications rates of $14.83 and $13.70 for rural and urban areas are lawful. As you are aware, the FCC's decisions in *Teleport* and in the *Consolidated Order* put the burden on Georgia Power to provide sufficient information to rebut the FCC's 3 and 5 entity presumptions.[2]

As you know, Georgia Power has attempted to rebut the telecom rate attaching entities presumptions in an ongoing dispute with Comcast before the FCC.[3] In that proceeding, Comcast explained in detail why Georgia Power's attempt to rebut the attaching entity presumptions was deficient under the FCC's rules and precedent in several ways.[4] That dispute remains pending before the FCC. More recently, in a related lawsuit involving Georgia Power and Comcast, a

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[1] 47 C.F.R. § 1.1404(j) ("A utility must supply a cable television operator or telecommunications carrier the information required in paragraph (g), (h) or (i) of this section... within 30 days of the request by the cable television operator or telecommunications carrier.").

[2] *See In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 70 (rel. May 25, 2001) ("*Consolidated Order*"), *petitions for review denied, Southern Company Services, Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002); *Teleport Communications Atlanta, Inc. v. Georgia Power Company*, Order on Review, 17 FCC Rcd 19859, ¶25 (rel. October 8, 2002) ("*Teleport*"), *aff'd, Georgia Power Co. v. Teleport Communications Atlanta, Inc.*, 346 F.3d 1033 (11th Cir. 2003).

[3] Most recently, you provided the FCC with an eight-page county-by-county list of attachments per pole that included the names of companies attached to the specific poles to which Comcast was attached. *Comcast Cable Communications Management, LLC v. Georgia Power Company*, File No. EB-07-MD-003, Response of Georgia Power, Exhibit A, Attachment 7, pp. 57-64 (Response filed October 26, 2007).

[4] *Comcast Cable Communications Management, LLC v. Georgia Power Company*, File No. EB-07-MD-003, Reply of Comcast, pp. 12-19 (Reply filed November 15, 2007).

Georgia state court held that disputes concerning attaching entity counts affecting the telecom rate should be resolved by the FCC.[5]

In light of the above, we have advised our clients, to the extent they provide telecommunications services, to pay a telecommunications rate of $8.65 in urban areas and $13.05 in rural areas, with the same true-up procedures described above for the cable rate should Georgia Power provide sufficient attaching entity survey data and the parties agree.

Notice of Telecom Use

Finally, Georgia Power's attachment count survey appears to ask cable operators to inform Georgia Power how many pole attachments are used to provide telecommunications on a county-by-county basis. We must inform you that the FCC's rules only require cable operators to notify pole owners when the cable operator begins to provide telecom service over pole attached facilities.[6] Furthermore, because it is not entirely clear to us what the attachment count survey is asking our clients to certify to, we have advised CTAG members not to complete it but instead to provide, in writing, the information sought by Georgia Power in order to render an accurate bill. Specifically, we are advising our clients to provide GPC with notice of telecommunications service and the specific numbers of *total* poles used to provide telecommunications. As CTAG members have done in the past, we have advised cable operators to inform Georgia Power of the counties in which any telecommunications service is located so Georgia Power may conduct an attaching entity survey for the relevant geographic area. We expect that Georgia Power's bills will accurately reflect this information once received from our clients.

VoIP is Not Telecommunications

Finally, we want to take this opportunity to remind you that CTAG members are not required to pay Georgia Power a telecom rate for VoIP pole attachments. Only pole attachments that are specifically used to provide telecommunications service are eligible for the higher telecom attachment rate. See 47 U.S.C. § 224(e)(1). Thus, regardless of the character of the attaching entity, it is the actual use of a pole attachment to carry telecommunications services or other services that determines the rate.

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[5] *Georgia Power Company v. Comcast Cable Communications of Pennsylvania., Inc., et al.*, Special Master's Proposed Finding of Facts and Conclusions of Law, File Nos. 2006-CV-116060, 2007-CV-135617, p. 13, ¶ 27 (Fulton Cty. Sup. September 19, 2008) ("[T]he FCC, not this Court, should resolve the specific calculations including the manner of attachment, rates, and formulas, because the Telecommunications Act reserves these issues to the FCC.").

[6] The FCC's Rules require cable operators to notify pole owners when the cable operator provides telecommunications service. *See* 47 C.F.R. § 1.1403(3).

Interconnected VoIP service has not been classified or defined by the FCC to be a telecommunications service as defined in Sections 153 and 224 of the Federal Communications Act, 47 U.S.C. §§ 153 and 224. Interconnected VoIP service falls under Section 9.3 of the FCC's Regulations, 47 C.F.R. § 9.3. The FCC has been considering the question of the classification of VoIP as either a telecommunications service or an information service in the *IP-Enabled Services* rulemaking proceeding.[7] Despite finding certain traditional social telecommunications regulations (such as E911, CALEA, CPNI, and TRS) applicable to VoIP, the Commission has repeatedly held that its rulings in other proceedings do not in any way prejudge the statutory classification of VoIP, and that it is in the *IP-Enabled Services* proceeding where such a classification will be made.[8] The Commission has found that VoIP services that start and end as VoIP and travel over the public Internet are not telecommunications services and that calls that start and end on the PSTN but are routed as VoIP in the middle are telecommunications services, but it has made no ruling as to Interconnected VoIP, which starts as VoIP and is terminated on the PSTN (or starts on the PSTN and is terminated as VoIP).[9] Furthermore, the FCC has suggested that Interconnected VoIP offered by cable may be preempted from state regulation in the same way that Vonage's VoIP service is preempted,[10] and

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[7] *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (rel. March 10, 2004).

[8] *E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 26 (rel. June 3, 2005) ("We find that regardless of the regulatory classification, the Commission has ancillary jurisdiction to promote public safety by adopting E911 rules for interconnected VoIP services. This Order, however, in no way prejudges how the Commission might ultimately classify these services."); *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, ¶45 (rel. September 23, 2005) ("Indeed, the Commission has yet to determine the statutory classification of providers of interconnected VoIP for purposes of the Communications Act."); *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, IP Enabled Services*, Report and Order and FNPRM, FCC 07-22, ¶ 54 (rel. April 2, 2007) ("Since we have not decided whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, nor do we do so today, we analyze the issues addressed in this Order under our Title I ancillary jurisdiction to encompass both types of service."); *See also Telecommunications Relay Services and Speech to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, FCC 07-170, WC Docket 04-36, fn. 50 (rel. June 15, 2007) ("The actions we take today do not prejudge the Commission's ultimate classification of interconnected VoIP service as a "telecommunications service" or as an "information service" under the statutory definitions of those terms."); *See also Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, and NPRM, WC Docket 07-243, FCC 07-188, fn. 50 (rel. November 9, 2007) ("We continue to consider whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, and we do not make that determination today. *See* 47 U.S.C. § 153(20), (46) (defining "information service" and "telecommunications service")).

[9] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, ¶ 2, n.3 (rel. February 19, 2004); *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (rel. April 21, 2004).

[10] *In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd 22404, ¶ 32 (rel. November 12, 2004) ("Accordingly, to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an

has continued to refuse to classify Interconnected VoIP as telecommunications service when it assessed USF contribution obligations on the service.[11] The Commission again pointed out the current non-classified status of Interconnected VoIP in finding that telecommunications carriers could interconnect with ILECs for the purpose of providing downstream interconnection to entities providing interconnected VoIP services to end-users.[12] The Commission repeated this observation again this past July in a ruling on a retention marketing dispute between cable Interconnected VoIP providers and Verizon, where it held that interconnected VoIP is still not classified as telecommunications service despite the fact that its providers may lawfully obtain numbering resources.[13] Even more recently, the FCC noted that Congress recognizes that VoIP is in a separate service category from telecommunications services, referring to VoIP as "IP-enabled voice services" in new legislation.[14]

Furthermore, as you may know the state of Georgia has preempted the regulation of VoIP as a telecommunications service. The Georgia law states that the Public Service Commission does not have "any jurisdiction, right, power, authority, or duty to impose any requirement or regulation relating to the setting of rates or terms and conditions for the offering of broadband service, VoIP, or wireless service." OCGA § 46-5-222(a). VoIP is defined as "voice over Internet protocol services offering real time multidirectional voice functionality utilizing any Internet protocol." *Id.* § 46-5-221(2). Although the statute distinguishes between "VoIP" and

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extent comparable to what we have done in this Order."), *aff'd, Minnesota Public Utilities Commission et al., v. FCC*, Case Nos. 05-1069 (8th Cir. 2007).

[11] *In the Matter of Universal Service Contribution Methodology*, Report and Order and NPRM, FCC 06-94, ¶ 56 (rel. June 27, 2006).

[12] *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, DA 07-709, ¶ 17 (rel. March 1, 2007) ("[T]he question concerning the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket.").

[13] *Bright House Networks et al v. Verizon*, Memorandum Opinion and Order, FCC 08-159, fn. 91 (rel. June 23, 2008) ("...although the Commission has not determined whether interconnected VoIP service should be classified as a telecommunications service, and although only telecommunications carriers are entitled to obtain direct access to numbering resources, "[t]o the extent that an interconnected VoIP provider is licensed or certificated as a carrier, that carrier is eligible to obtain numbering resources directly from NANPA, subject to all relevant rules and procedures applicable to carriers") (internal citations omitted).

[14] *In the Matter of Implementation of the NET 911 Improvement Act of 2008*, Report and Order, FCC 08-249, fn 3 (rel. October 21, 2008) ("The NET 911 Act uses the term "IP-enabled voice service," which is given the same meaning as "interconnected VoIP service" as defined by section 9.3 of the Commission's rules. *See* NET 911 Act § 101(3); Wireless 911 Act § 7(8). For the purposes of this Order, the terms "IP-enabled voice services" and "interconnected VoIP" are used synonymously. An interconnected VoIP service is a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires IP-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network (PSTN) and to terminate calls to the PSTN. See 47 C.F.R. § 9.3.")

"broadband services," *see* OCGA § 46-5-221 (defining broadband and VoIP services), both are effectively removed from the PSC's regulatory jurisdiction in the same manner. This provides further instruction to Georgia Power, if any were needed, that the law does not consider VoIP to be the same as telecommunications service or telephone service, even if they perform the same functions.

Thank you in advance for your assistance. We look forward to receiving your response.

Sincerely,

John D. Seiver
Christopher A. Fedeli

cc: Stephen Loftin
Robert P. Williams II

Attachment III

BINGHAM

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August 1, 2008

Via Hand Delivery

Marlene H. Dortch, Secretary
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Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

Alexander P. Starr, Esq.
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
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Re: EasyTEL Communications, Inc.; Request for Mediation of a Pole Attachment Dispute

Dear Secretary Dortch and Mr. Starr:

EasyTEL Communications, Inc. ("EasyTEL") requests the Enforcement Bureau's assistance in mediating an ongoing pole attachment dispute between EasyTEL and the Public Service Company of Oklahoma ("PSO"). The dispute arises out of PSO's discriminatory application and incorrect computation of its pole attachment rate in Oklahoma. The Bureau's intervention is needed to compel PSO to comply with the Commission's rules regarding pole attachments.

Parties and Jurisdiction of the Federal Communications Commission

EasyTEL is an Oklahoma corporation whose principal place of business is 7335 S. Lewis Ave., Suite 100, Tulsa, Oklahoma 74136. EasyTEL offers video and telecommunications services in Oklahoma, including Tulsa, Jenks, and Broken Arrow.

PSO, a unit of American Electric Power, is located at 212 East 6th Street, Tulsa, Oklahoma 74119. PSO owns and maintains utility poles in Oklahoma. On information and belief, PSO is not a railroad, is not cooperatively organized and is not owned by the Federal Government or any State.

The State of Oklahoma has not certified that it regulates pole attachments, and therefore the Commission has jurisdiction in this matter.

Background

EasyTEL has a pole attachment agreement in effect with PSO, and pursuant to that agreement, has attached cabling to utility poles owned and controlled by PSO. PSO charges EasyTEL the maximum "telecommunications rate" permitted under FCC regulations, found at 47 C.F.R. § 1.1409(e)(2), because EasyTEL offers both telecommunications and video services.

In May 2008, EasyTEL received notice that its rate to attach to PSO's poles would increase to $25.31 as of July 1, 2008. EasyTEL also discovered around May 2008 that PSO charges a lower "cable rate" to Cox Communications, Inc. ("Cox"), one of EasyTEL's competitors for both video and telecommunications customers. EasyTEL asked PSO to explain why a different rate was charged to Cox when both Cox and EasyTEL provide the same types of services. PSO replied that whereas EasyTEL admits providing both telecommunications and video services, Cox claims to provide only video and broadband Internet access services (including VoIP). EasyTEL has advised PSO that Cox provides both telecommunications and video services, as evidenced by the fact that affiliates of Cox have filed intrastate local exchange service tariffs with the Oklahoma Corporation Commission for service territories that include Tulsa. PSO failed to provide further explanation about the application of different rates. PSO has failed to reduce the rate charged to EasyTEL, and to the best of EasyTEL's knowledge has not increased the rate it charges Cox. Accordingly, PSO is maintaining a discriminatory pole attachment rate regime that benefits the larger, entrenched cable operator, Cox.

On June 6, 2008, EasyTEL requested PSO provide information on its calculation of rates for telecommunications attachments, to which PSO provided a response on June 20, 2008. Upon review of the computation, EasyTEL found the PSO uses the formula set forth in the Commission's rules at 47 C.F.R. § 1.1409(e)(2). However, PSO uses the formula with a factor of 3 for the average number of attaching entities. On July 9, 2008, EasyTEL asked PSO to explain whether the use of 3 attaching entities is derived from the FCC's rebuttable presumptive average as set forth in 47 C.F.R. § 1.1417(c) or whether PSO has established its own presumptive average. To date, PSO has not responded to that inquiry.

PSO Fails to Apply its "Telecommunications Rate" on a Non-Discriminatory basis to Providers of Telecommunications and Cable

Section 224 of the Communications Act of 1934, as amended, and the Commission's rules require a utility such as PSO to provide telecommunications carriers and cable system operators with non-discriminatory access to poles. EasyTEL and other providers of both telecommunications and cable services must be charged the same pole attachment rate. By charging EasyTEL the "telecommunications rate" and failing to charge the same

rate to similar providers, such as Cox, PSO violates the requirement to apply its rates on a non-discriminatory basis. If this violation is not addressed, EasyTEL's operations will be adversely harmed as it will be forced to absorb an additional cost not imposed on its competitor or its competitor's customers.

PSO Fails to Use the Relevant Presumption for Number of Attachers

When a utility elects to charge the maximum rate allowed for telecommunications carriers under the Commission's rules, it must use the formula set forth at 47 C.F.R. § 1.1409(e)(2), including the FCC's presumptive average of 5 attaching entities for an urban area such as Tulsa, unless it establishes its own presumptive average number. PSO has failed to demonstrate that it has established its own presumptive average number of attachers and wrongly uses a presumption of 3 attachers for an urban area. Therefore, PSO must recalculate the applicable telecommunications rate using a presumptive average of 5 attaching entities. In addition, PSO should only charge EasyTEL a rate calculated with the correct computation in future invoices and should credit EasyTEL's account to true-up overcharges incurred since July 1, 2008 when the current rate took effect.

EasyTEL has exchanged correspondence and has had one telephone conference with counsel for PSO since this matter came to its attention. We believe that further progress cannot be made without the Commission's assistance. On August 1, 2008, PSO's counsel was notified that this request for mediation would be filed, but EasyTEL has no knowledge of whether PSO will voluntarily agree to mediation. If PSO declines to participate in mediation, EasyTEL expects to proceed with a formal complaint.

Sincerely yours,

Danielle Burt

Charles A. Rohe
Danielle Burt

Counsel for EasyTEL Communications, Inc.

cc: T. E. Kloehr, EasyTEL
Thomas G. St. Pierre, Counsel for PSO